

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

SILVER LAKE ACTION COMMITTEE,)

Appellant,)

v.)

CITY OF EVERETT; ALLEN D.
CURRIER; and CHARTER CLUB
LIMITED PARTNERSHIP and CENTRON
CORPORATION,)

Respondents.)

SHB No. 88-59

ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

This case involves a request for review of the approval by the City of Everett of a revision to a shoreline substantial development permit for the development of an apartment complex and related uses on the shoreline of Silver Lake within the City of Everett.

On February 27, 1989, appellant Silver Lake Action Committee (SLAC) filed a Motion for Summary Judgment. On the same day respondent Charter Club/Centron also filed a Motion for Summary Judgment. Written responses by the parties were received on March 20

1 and 21, 1989. Oral argument on the cross motions was heard in
2 Seattle, Washington, on March 29, 1989, before the Shorelines Hearings
3 Board: Wick Dufford (Presiding), Judith A. Bendor, Harold S.
4 Zimmerman, and Gordon Crandall.

5 Peter Eglick and Robert Meinig, attorneys at law, represented
6 SLAC; Kimberly Boyce and John Phillips, attorneys at law, represented
7 Charter Club/Centron; Walter Sellers, Assistant City Attorney,
8 represented Everett; and Allen D. Currier represented himself.

9 I. MATERIALS CONSIDERED

10 The following materials were considered in ruling on these
11 Motions.

12 1. Request for Review, received December 14, 1988, with
13 attachments:

14 a) Substantial Development Permit, SMA #5-85, issued to
15 Allen D. Currier;

16 b) Determination of Nonsignificance, SMA #5-85, dated
17 December 26, 1985;

18 c) Letter from Everett Planning Director to E. Dennis Riebe
19 (Centron), dated November 10, 1988;

20 d) Letter addressed to Dear Citizen from Everett Planning
21 Director, dated November 10, 1988.

22 2. Certification of Request for Review by Attorney General and
23 Department of Ecology, dated January 11, 1989.

24 3. Appellant's Preliminary List of Issues, Witnesses, and
25 Exhibits, dated February 3, 1989.

26 4. Appellant's Motion for Summary Judgment, filed February 27,
27 1989, with appellant's supporting memorandum.

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2 5. Declaration of Robert R. Mienig, filed February 27, 1989,
3 with attachments:

- 4 a) Substantial Development Permit, SMA #5-85;
5 b) Application for permit SMA #5-85, submitted by Allen D.
6 Currier;
7 c) Environmental Checklist, application of Allen D. Currier;
8 d) Hearing Examiner decision, dated March 28, 1986;
9 e) Hearing Examiner order, dated May 20, 1986;
10 f) Standard Agreement for Acquisition of Real Property,
11 executed by Allen D. Currier and James W. Summers (Centron
12 Corporation) on March 16, 1988;
13 g) Statutory Warranty deed, dated September 12, 1988;
14 h) Letter from E. Dennis Riebe to Everett Planning
15 Department, dated June 21, 1988;
16 i) Letter from E. Dennis Riebe to Everett Planning
17 Department, dated October 28, 1988;
18 j) Letter from Everett Public Works Department to E. Dennis
19 Riebe, dated October 25, 1988;
20 k) Memo of Colin Quinn to Everett Planning Department,
21 transmitted September 14, 1988;
22 l) Letter from Everett Planning Department to Colin Quinn,
23 dated September 14, 1988;
24 m) Construction contract between Charter Club Limited
25 Partnership and Centron General Construction Corporation,
26 dated August 10, 1988;
27 n) Application for Construction Permit, dated August 26,
1988.

6. Respondent's Motion for Summary Judgment, filed February 27,
1989, with Respondent's Supporting Memorandum.

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1 7. Exhibits to respondent's Motion for Summary Judgment:

- 2 a) Determination of Non-Significance, SM #5-85;
- 3 b) Notice of Hearing and Application for Shoreline
- 4 Management Substantial Development and Determination of
- 5 Non-Significance;
- 6 c) Hearing Examiner decision, dated March 28, 1986.
- 7 d) Hearing Examiner decision on request for modification of
- 8 original decision, dated July 11, 1986.
- 9 e) Letter from Department of Ecology to Allen D. Currier,
- 10 dated August 28, 1986;
- 11 f) Affidavit of Gerry Ervine, dated February 24, 1989;
- 12 g) Affidavit of James W. Summers, dated February 24, 1989
- 13 with attachments (i) Standard Agreement for Acquisition of
- 14 Real Property, March 16, 1988; (ii) Outline specifications
- 15 for Charter Club at Silver Lake Apartments, dated July 14,
- 16 1988; (iii) Construction Contract between Charter Club
- 17 Limited Partnership and Centron General Construction
- 18 Corporation, dated August 10, 1988;
- 19 h) Notice of Authorization issued to Allen Currier by City
- 20 of Everett;
- 21 i) Letter from Everett Planning Department to Colin Quinn,
- 22 dated September 14, 1988;
- 23 j) Excerpts from Everett Municipal Code concerning SEPA
- 24 appeals;
- 25 k) Notice of application and issuance of DNS, swearing to
- 26 the posting of the same in at least (3) conspicuous locations
- 27 on or near the site, dated January 7, 1986; affidavit of
- Publication of Notice, dated January 3, 1986; mailing list of
- nearby property owners;
- l) Silver Lake Action Committee flyer regarding development
- proposals;
- m) Letter of E. Dennis Riebe to Everett Planning Department,
- dated October 28, 1988;

1 n) Letter of Everett Planning Director to E. Dennis Riebe,
2 dated November 10, 1988;

3 o) Letter of Everett Planning Director to Department of
4 Ecology, dated November 10, 1988; letter addressed to Citizen
5 from Everett Planning Director, dated November 10, 1988.

6 8. Appellant's Memorandum in response to respondents' motion,
7 filed March 21, 1989.

8 9. Second Declaration of Robert R. Meinig, filed March 21, 1989,
9 with attachments:

10 a) Excerpt, "Silver Lake Water Quality Nutrient Loading and
11 Management", Water Resources Series Technical Report No. 106,
12 University of Washington, May 1, 1988;

13 b) Excerpt, draft "Silver Lake Shoreline Management and
14 Access Plan" prepared for Everett Planning Department.

15 c) Letter from Roy E. Lewis, Jr., to Colin Quinn, dated
16 April 14, 1988;

17 d) Letter from Colin Quinn to Clark Leeman, dated April 18,
18 1988.

19 10. Depositions of Dennis Derickson, Gerry Ervine and E. Dennis
20 Riebe.

21 11. Respondent's memorandum in response to appellant's motion,
22 filed March 20, 1989 with attachments:

23 a) Affidavit of Allen D. Currier

24 b) Excerpts from Deposition of Gerry Ervine and Dennis
25 Derickson

26 c) Declaration of Kimberly A. Boyce, with two assignment of
27 funds documents and letter of Roy E. Lewis dated July 20,
1988.

12. Respondents reply memorandum, filed March 23, 1989.

13. Appellant's reply memorandum, filed March 23, 1989, with
third Declaration of Robert R. Meinig and excerpts from City of
Everett Ordinance No. 723-80 and 692-80.

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II. UNDISPUTED FACTS

On review of the materials considered, the Board finds the following to be undisputed:

1. On December 16, 1985, the City of Everett received an application (SMA #5-85) for a substantial development permit from Allen D. Currier. The application proposed construction of a 255 unit apartment complex and 32,000 square feet of commercial/office space within shorelines of Silver Lake.

2. On December 26, 1985, the City of Everett issued a Determination of Nonsignificance (DNS) in relation to the application.

3. Notice of the application and the DNS were published twice in a newspaper of general circulation, posted and mailed to property owners within 300 feet of the boundary of the property.

4. A public hearing was held before the City of Everett's Hearing Examiner and a decision was issued on March 28, 1986, approving the permit with conditions.

5. On a request for reconsideration, another public hearing was held and another decision was issued by the Hearing Examiner on July 11, 1986, approving the permit with conditions.

6. A written permit document was signed by the authorized official for the City of Everett on July 31, 1986, and transmitted to the Department of Ecology. The date of actual receipt of the permit by Ecology was August 1, 1986.

1 7. The City of Everett issued a Notice of Authorization to the
2 permittee authorizing construction under permit SMA #5-85 to commence
3 on September 1, 1986. The document recited: "Permit valid until
4 September 1, 1988".

5 8. No appeals of the substantial development permit or the DNS
6 issued in connection with it were filed prior to September 1, 1986.

7 9. The Hearing Examiner prohibited issuance of a building permit
8 until a traffic study was completed and the applicant agreed to comply
9 with all the traffic improvements required by the study. The City of
10 Everett contracted with an outside consultant to do the study and the
11 timing of its preparation was not within the applicant's control. The
12 study was completed on March 24, 1987.

13 10. On March 16, 1988, Centron Corporation entered into a
14 purchase and sale contract with the original applicant Allen Currier
15 to purchase a majority of the property for which permit SMA #5-85 was
16 issued. Subsequently Centron assigned its rights in title to Charter
17 Club Limited Partnership.

18 11. In March of 1988, Centron hired Dodds Engineers to prepare
19 plans for grading and utilities, erosion and sedimentation control,
20 water, sewer and storm drainage.

21 12. In the spring or early summer of 1988, Centron retained J.
22 Clark Johnson, structural engineers, who completed their work in
23 August, 1988.

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1 13. On June 21, 1988, a historical audit of the site was
2 completed for Centron by Golder Associates. On this same date,
3 Centron submitted drawings and plans to the City and requested a pre-
4 application meeting with the City, preparatory to seeking building
5 permits. In July of 1988, such a pre-application meeting was held, at
6 which the City requested additional information which was promptly
7 supplied.

8 14. On July 14, 1988, Centron completed outline specifications
9 for the project.

10 15. On August 10, 1988, Charter Club Limited Partnership entered
11 into a construction contract with Centron General Construction
12 Corporation for the construction of the project.

13 16. A landscape architect was retained in July or August of
14 1988, to do the landscape designing that appears in the final plans.

15 17. Application for building permits for the project was made to
16 the City on August 26, 1988. The application sought authorization to
17 build a project reduced in density from 255 to 210 apartment units,
18 with concomitant reduction of parking space and impervious surfaces.
19 Open space on the site was increased.

20 18. On September 14, 1988, the City of Everett, through its
21 Senior Planner, advised Centron by letter that the filing for building
22 permits on August 26, 1988, showed "substantial progress toward
23 construction" in the City's view. The letter advised that three years
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1 remained under the substantial development permit to complete the
2 project (until September 1, 1991).

3 19. On October 25, 1988, the City of Everett, through its Public
4 Works Department, advised Centron that a revision to the substantial
5 development permit would have to be sought to reflect the changes in
6 the project shown by the building permit applications.

7 20. On October 28, 1988, Centron applied for a substantial
8 development permit revision authorizing the project as changed by the
9 building permit application.

10 21. On November 10, 1988, the City of Everett granted the
11 revision, finding the proposal "to be within the scope and intent of
12 the original permit".

13 III. ISSUES PRESENTED

14 By virtue of a Pre-Hearing Order entered by the Board on February
15 10, 1989, the issues in this case were limited to the 12 issues set
16 set forth in "Appellant's Preliminary List of Issues, Witnesses and
17 Exhibits" filed on February 8, 1989. These issues were listed:

18 1. Whether the revision to the shoreline substantial
19 development permit issued by the City of Everett to the
20 respondent for the development of an apartment building
21 project and related uses on the shoreline of Silver Lake
22 is based upon an underlying shoreline substantial
23 development permit which has expired and is therefore not
24 subject to revision.

25 2. If the underlying, original permit has not expired and
26 is subject to revision, whether the revised permit
27 involves changes which are within the scope of allowable
revisions pursuant to WAC 173-14-064.

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1 3. Whether WAC 173-14-064, limiting review of revised
2 permits, is a valid regulation, consistent with the
3 Shoreline Management Act (SMA) and the State Environmental
Policy ACT (SEPA).

4 4. Whether the City of Everett (City) provided proper
5 notice of the revision to the original permit pursuant to
6 WAC 173-14-064(4).

7 5. Whether the City provided proper notice of the
8 original permit application and threshold determination
9 for that application as required by the SMA (RCW
10 90.58.140), WAC 173-14-070, and SEPA, WAC 197-11-510.

11 6. Whether the County's determination of non-significance
12 (DNS) for the original permit application is consistent
13 with the provisions of the State Environmental Policy Act,
14 RCW Ch. 43.21C, and the coordinate state regulations and
15 the City's SEPA ordinance. . . .

16 7. Whether required SEPA procedures were followed in the
17 processing of the City's threshold determination for the
18 original permit application and in its review of the
19 revised application.

20 8. Whether the proposal's potential adverse impacts are
21 adequately mitigated by the measures imposed by conditions
22 of the DNS and of the permit approval.

23 9. Whether the issuance of the shoreline substantial
24 development permit for the proposed project (both original
25 and revised) is consistent with the Snohomish County
26 Shoreline Management Master Program (SCSMMP) (to the
27 extent that it is applicable to this project) including
but not limited to the following provisions: shoreline use
element goal and policies, Subsection D.A., economic
development element goal and policies, Subsection D.B.,
conservation element goal and policies, Subsection D.G.,
implementation element goal and policies, Subsection D.I.,
urban environment management policies, at E-3, 4, and the
policies and regulation for the following shoreline use
activities: commercial development, at F-18, 19, landfill,
at F-35, 36, piers, at F-44, 45, and residential
development, at F-52-55.

1 10. Whether the issuance of the shoreline substantial
2 development permit for the proposed project (both original
3 and revised) is consistent with the City of Everett
4 Shoreline Master Program (SMP) (to the extent it is
5 applicable to this project), including but not limited to
6 the following provisions: shoreline use element goal and
7 objectives, Subsection II.I, economic development goal and
8 objectives, Subsection II.II, conservation element goal
9 and objectives, Subsection II.VII, urban environment
10 management policies, at III-3,4, the general regulations
11 for use activities, at IV-6,7 and the policies and
12 regulations for the following use activities: commercial
13 development, at IV-18,19, landfill, at IV-27-29, piers, at
14 IV-40,41, and residential development, at IV-48,49.

9 11. Whether the issuance of the proposed shoreline
10 substantial development permit for the proposed project
11 (both original and revised) is consistent with the SMA and
12 its implementing regulations, WAC 173-16-060, including
13 but not limited to, those relating to commercial
14 development, residential development, landfill, and piers.

12 12. Whether the issuance of the proposed shoreline
13 substantial development permit for the proposed project
14 (both original and revised) is consistent with the SMA
15 natural systems criteria for wetlands, including marshes,
16 bogs, swamps, lakes, and floodplains, as identified in WAC
17 173-16-050.

16 Respondent Charter Club/Centron in its Motion for Summary
17 Judgment asks that Issues 1 and 3 through 12 in the above list be
18 dismissed as a matter of law. This should be done, it is argued,
19 because: a) the original permit had not expired before the revision
20 was issued, b) these issues cannot now be raised because no appeal was
21 made of the original permit decision, and c) WAC 173-14-064 governing
22 revisions is a valid regulation.

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1 Appellant Silver Lake Action Committee in its Motion for Summary
2 Judgment asserts that the original permit expired before the revision
3 was approved. It asks the Board to set aside the City's permit
4 revision because at the time of that decision there was no valid
5 permit to revise. In opposition to respondent's Motion, appellant
6 also asserts that the revision of the permit reopened issues of
7 environmental impact and consistency with shoreline law. Appellant
8 also argues that WAC 173-14-064 relating to permit revisions is
9 invalid.

10 IV. CONCLUSIONS

11 Based on the undisputed facts, the Board reaches the following
12 conclusions:

13 1. The instant case involves a decision of local government on
14 an application for revision of a substantial development permit. The
15 applicable regulations are those in effect at the time the application
16 was made. Talbot v. Gray, 11 Wn. App. 807, 525 P.2d 801 (1974).
17 These regulations, at WAC 173-14-064, state the following in relation
18 to revision requests:

19 When an applicant seeks to revise a permit, local
20 government shall request from the applicant detailed
21 plans and text describing the proposed changes in the
22 permit.

23 (1) If local government determines that the
24 proposed changes are within the scope and intent of the
25 original permit, local government may approve a
26 revision.

27 (2) "Within the scope and intent of the original
28 permit" means all of the following: [A detailed
29 definition of the term follows.]

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1 . . .

2 (7) . . . Appeals shall be based only upon
3 contentions of noncompliance with the provisions of WAC
4 173-14-064(2) above. (Emphasis added.)

5 2. The Board questions whether it has jurisdiction over the
6 issue of permit expiration in the context of permit revision. WAC
7 173-14-064(7) limits Board review to determining whether the revision
8 is "within the scope and intent of the original permit". See WAC
9 173-14-064(2). However, since the parties have neither raised nor
10 briefed this issue, we prefer to base our decision on other grounds.

11 3. Assuming we do have authority to rule on the expiration
12 question in a proceeding of this kind, we conclude that the permit had
13 not expired when the revision was approved.

14 This conclusion depends upon application of the provisions of WAC
15 173-14-060. The pertinent parts of that section, as effective at the
16 time the original permit application was made, are:

17 The following time requirements shall apply to all
18 substantial development, conditional use and variance
19 permits:

20 (1) Construction or substantial progress towards
21 construction of a project for which a permit has been
22 granted pursuant to the act must be undertaken within
23 two years after the approval of the permit.
24 Substantial progress towards construction shall
25 include, but not be limited to the letting of bids,
making of contracts, purchase of materials involved in
development, . . .

(2) If a project for which a permit has been
granted pursuant to the act has not been completed
within five years after the approval of the permit by
the local government, the local government that granted

1 the permit shall, at the expiration of the five-year
2 period, review the permit, and upon a showing of good
cause, do either of the following:

- 3 (a) Extend the permit for one year; or
4 (b) Terminate the permit. . . . (Emphasis added.)

5 4. The expiration issue in this case depends on the answers to
6 two questions: a) When did the two year period for "substantial
7 progress towards construction" end?

8 b) Was there "substantial progress towards
9 construction" before that date?

10 5. We decide that the two-year period began on September 1, 1986
11 and ended on September 1, 1988.

12 Appellant emphasizes the word "approved" in WAC 173-14-060, and
13 argues that the two-year period started to run on July 11, 1986, (when
14 the hearing examiner's final decision was issued) or on July 31, 1986
15 (when the permit was signed by the authorized official of the City of
16 Everett). In context, however, we think that "approval" is
17 appropriately construed to mean the date at which construction
18 lawfully could commence under the Shoreline Management Act.

19 That date, in this case, is September 1, 1986, thirty days after
20 the date of filing, in circumstances where no appeals were filed. RCW
21 90.58.140(5). Because the evident purpose of WAC 173-14-060 is to
22 promote the diligent pursuit of construction, it is only reasonable
23 that the time period provided be a period during which construction is
24 allowed to occur. This interpretation is reinforced by a proviso to

1 the regulation which tolls the two-year period during times when
2 construction was not pursued because of the pendency of litigation.

3 Moreover, this is the interpretation given by the City of Everett
4 and imparted to the permittee. We note that the City, by its Notice
5 of Authorization, expressly advised the permittee that the permit was
6 valid until September 1, 1988. The construction by an entity charged
7 with administration of a regulation is entitled to deference. Yakima
8 v. Civil Service Commission, 29 Wn. App. 765, 631 P.2d 400 (1981).

9 6. We further decide that substantial progress towards
10 construction was undertaken in this case prior to the conclusion of
11 the two-year period ending on September 1, 1988. We reach this
12 conclusion in consideration of the totality of actions taken by
13 Charter Club/Centron before that time, culminating in the application
14 for building permits. The preparations and detailed planning
15 necessary precedent to such an application are not normally undertaken
16 by persons with no intention of moving forward with development. The
17 successor permittee here was ready to proceed and actively pursuing
18 the last authorizations needed, within the two-year period.

19 7. Because the permit did not expire after two years for failure
20 to make adequate progress on the project, the permit by virtue of WAC
21 173-14-060(2) has at least a five year life span. It will not expire
22 until September 1, 1991. Accordingly, the permit revision sought on
23 October 28, 1988, was applied for during the effective life of the
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1 original permit, and the application cannot be seen as an application
2 for a new permit.

3 8. The time for appealing the original permit and related SEPA
4 compliance had long since run when the instant appeal was filed.
5 Therefore, all issues dealing with the issuance of the original permit
6 are now barred. RCW 90.58.180(1); RCW 43.21C.075(2).

7 9. As noted, by regulation a revision appeal is limited to
8 whether the revision is "within the scope and intent of the original
9 permit". Appellant has attempted to raise a separate issue of SEPA
10 compliance in connection with the revision decision. Under WAC
11 173-14-064(2), the definition of "scope and intent of the original
12 permit" includes the following:

13 (g) No substantial adverse environmental impact will
14 be caused by the project revision.

15 We conclude that no issue of SEPA compliance arises until the
16 "scope and intent" question is answered. If the revision is within
17 the "scope and intent" definition, no further environmental disclosure
18 under SEPA is necessary. See SEAPC v. Cammack II Orchards, 49 Wn.
19 App. 609, 744 P.2d 1101 (1987). If the revision is not within the
20 "scope and intent", the revision process was improper and the proposed
21 changes in the development are subject to all the requirements for a
22 new permit, including SEPA compliance.
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1 10. While the Board is without jurisdiction to render
2 declaratory rulings on the validity of a regulation on its face,
3 Seattle v. Department of Ecology, 37 Wn. App. 819, 683 P.2d 244
4 (1984), it is within our authority to determine the validity of rules
5 as applied in concrete cases, such as the matter at hand. See,
6 Weyerhaeuser Co. v. Department of Ecology, 86 Wn.2d 310, 545 P.2d 5
7 (1976). Regulations are presumed valid and must be upheld if they are
8 "reasonably consistent" with the statute they purport to implement.
9 Weyerhaeuser, supra.

10 We believe that WAC 173-14-064, meets the "reasonably consistent"
11 standard. RCW 90.58.180 authorizes the Shorelines Hearings Board to
12 review the "granting, denying or rescinding of a permit on shorelines
13 of the state. . . ." Permit revision is a part of the "granting,
14 denying or rescinding" process. WAC 173-14-064 functions to "fill in
15 the gaps" necessary to the effectuation of the general statutory
16 scheme. Hama Hama v. Shorelines Hearings Board, 85 Wn.2d 441, 536
17 P.2d 157 (1975).

V. ORDER

The Motion for Summary Judgment filed by the Silver Lake Action Committee is denied.

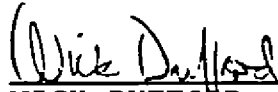
The Motion for Summary Judgment filed by Charter Club/Centron is granted.

The Pre-Hearing Order, issued February 10, 1989, limited the issues in this case to those issues set forth in appellant's Preliminary List of Issues, Witnesses and Exhibits. The sole issue remaining for resolution by the Board is Issue No. 2, which we paraphrase as follows:

Whether the revised permit involves changes which are within the scope and intent of the original permit under WAC 173-14-064.

DONE this 21st day of June, 1989.

SHORELINES HEARINGS BOARD


WICK DUFFORD, Chairman


JUDITH A. BENDOR, Member


HAROLD S. ZIMMERMAN, Member


GORDON F. CRANDALL, Member